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MEHEULA LAW, LLC  
A Limited Liability Law Company

RECEIVED

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COUNTY OF MAUI  
DEPT OF PLANNING  
ADMINISTRATION

Attorney for  
BRE ICONIC GWR OWNER, LLC

**BEFORE THE MAUI PLANNING COMMISSION  
COUNTY OF MAUI  
STATE OF HAWAII**

In the Matter of the Applications for:

BRE ICONIC GWR OWNER, LLC

To obtain a Special Management Area Use Permit, Step 1 Planned Development Approval, and Step 2 Planned Development Approval for the Grand Wailea Resort to transfer "H-2 Hotel" and "OS Open Space" zoning designation areas, update facilities and create 151 new guest room units, renovate and expand the resort swimming pool and restaurant facilities, expand the parking structure from three to four levels to provide 158 additional parking stalls, addition of approximately 30 public beach parking stalls, and related landscape, utility, and infrastructure improvements at 3850 Wailea Alanui Drive, Wailea, Island of Maui, Hawai'i, TMK (2) 2-1-008:109.

DOCKET NO. SM1 2018/0011  
(PD1 2019/001, PD2 2018/0003)

**BRE ICONIC GWR OWNER, LLC'S MOTION  
TO THE COMMISSION TO SET A  
DEADLINE FOR HEARING OFFICER TO  
SERVE HER §12-201-77  
RECOMMENDATION; MEMORANDUM IN  
SUPPORT OF MOTION; EXHIBITS 1-2;  
CERTIFICATE OF SERVICE**

Hearing Officer: The Hon. Linden Joesting

Contested Case Hearing Dates:  
July 29, July 30, July 31, August 3, 2020,

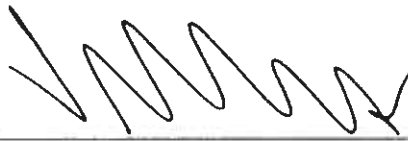
Reopened Hearing Dates:  
June 17-18, 2021

**BRE ICONIC GWR OWNER, LLC'S MOTION TO  
THE COMMISSION TO SET A DEADLINE FOR HEARING  
OFFICER TO SERVE HER §12-201-77 RECOMMENDATION**

BRE ICONIC GWR OWNER, LLC (“**Applicant**”), by and through Meheula Law, LLC, hereby submits this Motion to the Commission to Set a Deadline for the Hearing Officer to Serve her §12-201-77 Recommendation brought pursuant to MC §§ 12-201-20(am) and 66.

This motion is supported by the attached memorandum and the records and files herein.

DATED: Honolulu, Hawai‘i, February 10, 2023.

A handwritten signature in black ink, appearing to read 'WILLIAM MEHEULA', written over a horizontal line.

WILLIAM MEHEULA  
Attorney for BRE ICONIC GWR OWNER, LLC

**BEFORE THE MAUI PLANNING COMMISSION  
COUNTY OF MAUI  
STATE OF HAWAI'I**

In the Matter of the Applications for:

**BRE ICONIC GWR OWNER, LLC**

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DOCKET NO. SM1 2018/0011  
(PD1 2019/001, PD2 2018/0003)

MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

BRE ICONIC GWR OWNER, LLC ("**Applicant**"), by and through Meheula Law, LLC, hereby submits this Motion to the Commission to Set a Deadline for the Hearing Officer to Serve her §12-201-77 Recommendation brought pursuant to MC §§ 12-201-20(am) and 66.

Section 12-201-77 provides:

§12-201-77 Recommendations of hearing officer. (a) Submission of recommendations. Upon completion of the contested case the parties may submit proposed findings of fact, conclusions of law, decision and order within the time limit determined by the hearing officer or presiding officer. Said proposals shall be served on all other parties.

(b) The hearing officer shall prepare and submit to the commission the record of the hearing and a report setting forth proposed findings of fact, conclusions of law, decision and order.

(b) Contents of record. The record shall include the application, notice of hearing, motions, rulings, orders, a transcript of the hearing, documentary evidence, the proposed findings and objections, the report of the hearing officer, and all other matters placed in evidence.

(c) Service of hearing officer's report. The hearing officer's report and proposed findings of fact, conclusions of law, decision and order shall be served upon all parties. [Eff 7/25/93] (Auth: HRS §91-2) (Imp: HRS §91-2)

On October 12, 2018, Applicant filed its application requesting a Special Management Area Use Permit, Step 1 Planned Development Approval, and Step 3 Planned Development Approval for the Grand Wailea Resort ("**Application**").

On May 28, 2019, the Planning Department ("**Department**") issued its Report and Recommendation that recommended issuance of the requested permits with conditions. The Report and Recommendation at 34 stated: "The proposed project is estimated to cost approximately \$92 million over a five-year development period and is anticipated to create

approximately 82 jobs on average per year during the construction period, with an annual payroll of \$7.1 million.”

On June 28, 2019, Intervenor MĀLAMA KAKANILUA, PELE DEFENSE FUND, and HO‘OPONOPONO O MĀKENA (“**Intervenor**”) filed their Petition to Intervene, which was not opposed by Applicant.

The contested case hearing before Hearing Officer Linden Joesting (“**Hearing Officer**”) was conducted on July 29, 30, 31, and August 3, 2020. Thereafter, the Hearing Officer requested that the Parties submit proposed findings and conclusions by August 31, 2020 and the Parties filed their proposed findings and conclusions on that date.

Thereafter, the contested case hearing was reopened for further hearing on June 17 and 18, 2021, to specifically address any cultural impacts pursuant to *Ka Pa`akai O Ka `Aina v. Land Use Commission*, 94 Haw. 31, 7 P.3d 1068 (2000) (“**Ka Pa`akai**”). Thereafter, the Hearing Officer requested that the Parties submit proposed findings and conclusions on the Ka Pa`akai analysis by July 15, 2021 and the Parties filed their proposed Ka Pa`akai findings and conclusions on that date.

On March 25, 2022, Applicant filed a Motion to Discuss Potential Assistance to Hearing Officer to Timely Complete the §12-201-77 Recommendation that in part stated:

In light of the usual delay in submitting the final §12-201-77 Recommendation that covers both hearings, and the harm Applicant has and continues to incur from such delay -- from delay in start of the project work and intervening law such as Ordinance No. 5316 that adds new conditions or restricts for additional rooms --, Applicant submits this Motion to discuss whether there is anything that can be reasonably offered to assist the Hearing Officer to complete the Recommendation within the next 30 days.

On April 29, 2022, the Hearing Officer issued an order addressing this motion, attached hereto as Exhibit 1, that focused on completing the §12-201-77(c) record indicating that she would

thereafter submit the record with her report and proposed findings of fact, conclusions of law, decision and order under §12-201-77 (“**Recommendation**”).

On April 12, 2022, the Planning Department filed a Motion to Set Deadline for Hearings Officer to Complete §12-201-77 Recommendations or Alternatively to Request Recusal of Current Hearings Officer. On May 4, 2022, the Hearing Officer issued an order addressing this motion, attached hereto as Exhibit 2, that in part stated:

It should be noted that the Planning Department has itself delayed the progress of the case. Several months ago, I advised the Planning Department that I wanted to speak to the Commission about this report. However, the Planning Department, citing advice from the Corporation Counsel, denied my request. The Deputy Corporation Counsel assigned to the Planning Commission stated that I need to only issue a report. However, my client is the Planning Commission. Consulting with one's client should not be regulated by the same department which is a party.

While I have a deadline in mind, and continue to actively work on the report, a conversation with my client will shorten the time to report the results of the hearing. Therefore, the part of the Motion asking for a report date is granted. Once I am able to speak with my client then the date will be shared with all the parties.

In mid-November 2022, the Hearing Officer emailed counsel that she would submit the Recommendation to the Commission at a Commission hearing on December 13. Thereafter, in late November, she emailed counsel:

**From:** Linden Joesting <attys4vets@gmail.com>  
**Sent:** Wednesday, November 30, 2022 4:54 PM  
**To:** Bianca Isaki <bianca.isaki@gmail.com>; Kristin Tarnstrom <kristin.tarnstrom@co.maui.hi.us>; Bill Meheula <bill@meheulalaw.com>  
**Subject:** Submission of report

Counsel,

I have been informed that the report will not be on the agenda for the Planning Commission meeting on December 13th. The process will be for me to serve the report on all parties and only then will the Department schedule it on the agenda for discussion.

Thereafter, the parties expected the Hearing Officer to submit the Recommendation by December 13 and the Hearing Officer discussed alternatives to electronically transmit the Recommendation to Counsel, but then she did not. When asked, she replied:

**From:** Linden Joesting <attys4vets@gmail.com>  
**Sent:** Wednesday, **December 14, 2022 8:29 PM**  
**To:** Bianca Isaki <bianca.isaki@gmail.com>  
**Cc:** Bill Meheula <bill@meheulalaw.com>; Kristin Tarnstrom <Kristin.Tarnstrom@co.maui.hi.us>; Ann Cua <Ann.Cua@co.maui.hi.us>  
**Subject:** Re: Updated docket sheet please

No, nothing went out today and yes I will let you all know when the report is provided.

Ms. Tarnstrom sent me a different link today and I sent a testing doc to check if it works!

I would prefer to send the document directly to you rather than through the Department, although I welcome your idea. If there's another way to send it to you directly, rather than through the USPS, I'd prefer to do that so everyone gets the report simultaneously.

Respectfully,  
Linden

On Wed, Dec 14, 2022 at 12:59 PM Bianca Isaki <[bianca.isaki@gmail.com](mailto:bianca.isaki@gmail.com)> wrote:

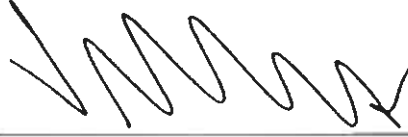
Good afternoon Hearing Officer,  
I don't see the report in the dropbox folder we sent, so I wanted to make sure I didn't miss anything. If it works to send to the Department's dropbox, we could also access that via a link to the Department dropbox folder to reduce the need to upload in two places. In any case, please let me know when the report is uploaded or if I should expect the report in an alternative format. Thank you.  
Bianca

It is now closing in on two months after December 13, 2022, and still no Recommendation.

Under the circumstances, and with all due respect to the Hearing Officer, Applicant requests that the Commission set a near term deadline for the Hearing Officer to serve her

Recommendation or an order to show cause why she has not yet served her Recommendation and when she likely will be able to do so.

DATED: Honolulu, Hawai'i, February 10, 2023.

A handwritten signature in black ink, consisting of a series of connected loops and a final checkmark-like stroke.

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WILLIAM MEHEULA  
Attorney for BRE ICONIC GWR OWNER, LLC



**BEFORE THE MAUI PLANNING COMMISSION  
COUNTY OF MAUI  
STATE OF HAWAII**

In the Matter of the Applications for:

**BRE ICONIC GWR OWNER, LLC**

To obtain a Special Management Area Use Permit, Step 1 Planned Development Approval, and Step 2 Planned Development Approval for the Grand Wailea Resort to transfer "H-2 Hotel" and "OS Open Space" zoning designation areas, update facilities and create 224 new guest room units, renovate and expand the resort swimming pool and restaurant facilities, expand the parking structure from three to five levels to provide 316 additional parking stalls, removal of the Seaside Chapel Structure, addition of approximately 30 public beach parking stalls, and related landscape, utility, and infrastructure improvements at 3850 Wailea Alanui Drive, Wailea, Island of Maui, Hawaii, TMK (2) 2-1-008:109.

DOCKET NO. SM1 2018/0011  
(PD1 2019/001, PD2 2018/0003)

**ORDER GRANTING APPLICANT'S  
MOTION TO DISCUSS POTENTIAL  
ASSISTANCE TO HEARING OFFICER;  
DECISION**

**ORDER GRANTING APPLICANT'S MOTION TO DISCUSS  
POTENTIAL ASSISTANCE TO HEARING OFFICER; DECISION**

Upon careful reflection, review of the Applicant's Motion submitted on March 25th, the responses from the other parties, the law, and the facts of this case, the following decision is provided;

**A. Preparation of the Record for the Commission**

The rules of the Maui Planning Commission require a record of a hearing where intervention is granted.

Contents of record. The record shall include the application, notice of hearing, motions, rulings, orders, a transcript of the hearing, documentary evidence, the proposed findings and objections, the report of the hearing officer, and all other matters placed into evidence.

HAR § 12-201-77(b)(sic).

It would be helpful to have the parties agree on the record before it is submitted to the Commission as this may ease the Commission's review. In order to accomplish this, there are some steps for the parties to accomplish. Without setting a rigid sequence of steps, since compiling the record is accomplished by the Planning Department, the parties shall submit flash drives updating their submissions to the Planning Department. Their earlier submissions were sent before the hearing was reopened. Please notify this Hearing Officer once all updated submissions have been received.

Once the submissions are complete, the Planning Department shall compile the record within two to three weeks from the last submission. When the record has been compiled, the parties shall review the record for its accuracy and completeness. If, in the unlikely event of a mistake or error, the parties shall inform the Planning Department and the other parties of any recommended correction(s). Please notify this Hearing Officer when the record has been fully compiled, when it is submitted to the parties for review, and then again upon approval by all parties. Notification of the Hearing Officer will happen four times.

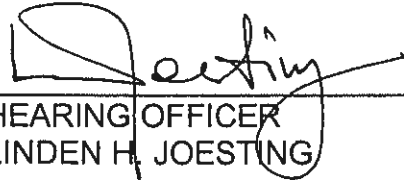
If the Planning Department needs to change these steps, it may do so in order to accomplish the goal of submitting an agreed upon record with the Hearing Officer's report.

B. Suggestions for Paralegal and Secretarial Assistance

The suggestions for paralegal and secretarial support by the Applicant's attorney were received and all of them were contacted.

The Motion as to a Discussion is granted. The discussion was held today. The Decision is to have all parties supplement their prior record submissions to the Planning Department, and then agree upon a record to submit to the Maui Planning Commission.

Respectfully submitted, Maui, Hawaii, April 29, 2022.

  
HEARING OFFICER  
LINDEN H. JOESTING

**BEFORE THE MAUI PLANNING COMMISSION  
COUNTY OF MAUI  
STATE OF HAWAII**

In the Matter of the Applications for:

**BRE ICONIC GWR OWNER, LLC**

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DOCKET NO. SM1 2018/0011  
(PD1 2019/001, PD2 2018/0003)

**ORDER PARTIALLY GRANTING MAUI  
COUNTY PLANNING DEPARTMENT'S  
MOTION TO SET DEADLINE TO  
COMPLETE RECOMMENDATIONS AND  
DENYING THE REQUESTED RECUSAL  
OF THE HEARING OFFICER**

**ORDER PARTIALLY GRANTING MAUI COUNTY PLANNING DEPARTMENT'S  
MOTION TO SET DEADLINE TO COMPLETE RECOMMENDATIONS AND DENYING  
THE REQUESTED RECUSAL OF THE HEARING OFFICER**

After a careful and thoughtful review of the Department's Motion, the responses from the other parties, the law, and the facts of this case, the following decision and analysis is provided;

**A. Motion to Set a Deadline**

**1. Background**

This contested case hearing is somewhat large and complex. There are about 1374 pages of testimony (excluding indices); over 100 pleadings, including several motions and other actions even before the hearing began; about 412 exhibits, some of which are over 100 pages; witness testimony received about 45 times, including from people who testified twice; six days of hearings; and the parties' proposed findings of fact & conclusions of law totaling over 417 pages.

The Department lists the numerous motions and pre-hearing work even before the start of the hearing. The list includes "motions to suspend the hearing due to Covid-19, motions for discovery, motions to recuse the hearings officer, motions for summary judgment, requests to continue the hearing, one writ of mandamus to the Hawaii Supreme Court, and several discovery conferences." Dept Mtn dtd Apr 12, 2022 at 2.

The Intervenors state in their Memo in Opposition that there are about sixteen issues involving at least six areas of law. MIO dtd Apr 18, 2022 at 2-3. The other two parties agreed, at the hearing on this Motion, that this list appeared correct. Intervenors stated the facts of this case are sufficiently complex such that this report is not delayed.

A case of this magnitude, with serious issues, deserves careful and thoughtful consideration. Moreover, the issue about the treatment of human bones is an important and sensitive one. Such a case demands additional care and thoughtfulness and to which arbitrary deadlines are incompatible.

Anecdotal evidence was submitted about other cases with complex technical issues and lots of evidence. These comparisons have limited use since there aren't that many cases and the anecdotal information may be incomplete. Barriers to the fair and timely

adjudication of contested cases have been noted by many other agencies.<sup>1</sup> These barriers include the “availability of hearing officers as well as other staffing, resource, and logistical obstacles.”<sup>2</sup> Other States and Hawaii State agencies have used different solutions for problems generated by holding intermittent hearings with different hearing officers.<sup>3</sup>

In summary, this case is complex and large. Speaking broadly, concerns about the timely adjudication of contested cases is somewhat common in certain types of contested cases. Regardless of these factors, both the Applicant and Department want the case finished soon. Their desire for a completion date is noted, a completion date has been planned for, and their concerns are taken seriously.

## 2. Legal analysis

Neither the Department nor the Applicant cite any factual or legal bases to support this motion. There are no laws, administrative rules, or cases that tie complexity and size of cases to a completion date. No guidance requires a report to be completed within a specified period of time. Counsel for the Department stated the Motion was brought because there was a sense the work needed to be re-prioritized. And that their goal is not to replace the Hearing Officer. This suggests the Motion is driven by personal feeling rather than the law.

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<sup>1</sup> The State legislature has studied the existing contested case system and evaluated adopting centralized hearing panels. “(F)actors driving the adoption of a central panel system for administrative hearings vary among the states, but historically, concerns over one or more of the following often serve as the basis for establishing a central panel: impartiality and equity; efficiency and cost-savings; and standardization and professionalization of the administrative hearings process.” 2020 “Hear Here or Hear There? A Review of Centralizing Administrative Hearing Functions,” Hawaii Legislative Reference Bureau, xiii. <https://lrh.hawaii.gov/publications/lrb-reports/?yr=2020>.

<sup>2</sup> *Id.* at xiii.

<sup>3</sup> *Id.* at xvi, 89-92.

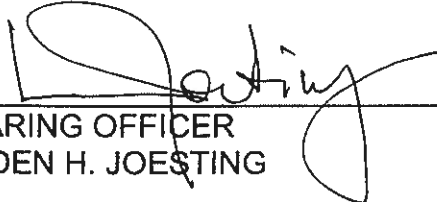
It should be noted that the Planning Department has itself delayed the progress of the case. Several months ago, I advised the Planning Department that I wanted to speak to the Commission about this report. However, the Planning Department, citing advice from the Corporation Counsel, denied my request. The Deputy Corporation Counsel assigned to the Planning Commission stated that I need to only issue a report. However, my client is the Planning Commission. Consulting with one's client should not be regulated by the same department which is a party.

While I have a deadline in mind, and continue to actively work on the report, a conversation with my client will shorten the time to report the results of the hearing. Therefore, the part of the Motion asking for a report date is granted. Once I am able to speak with my client then the date will be shared with all the parties.

B. Recusal of Hearing Officer

The Department's attorney said their goal is not to replace the Hearing Officer. Rather, the Department feels that progress on the Report has been irregular and they would like the work re-prioritized. Since the department no longer seeks to recuse the Hearing Officer, the Motion as to Recusal is Denied.

Respectfully submitted, Maui, Hawaii, May 4, 2022.

  
HEARING OFFICER  
LINDEN H. JOESTING

**BEFORE THE MAUI PLANNING COMMISSION**  
**COUNTY OF MAUI**  
**STATE OF HAWAII**

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DOCKET NO. SM1 2018/0011  
(PD1 2019/001, PD2 2018/0003)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served upon the following on the date indicated below and by the method indicated:

LINDEN H. JOESTING  
P.O. Box 367  
Kula, HI 96790  
[attys4vets@gmail.com](mailto:attys4vets@gmail.com)

☒ VIA EMAIL

☐ VIA U.S. MAIL,  
POSTAGE PREPAID

Hearing Officer,  
MAUI PLANNING COMMISSION



BIANCA ISAKI, ESQ.  
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1720 Huna Street, 401B  
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☒ VIA EMAIL  
☐ VIA U.S. MAIL,  
POSTAGE PREPAID

Attorneys for Intervenors  
MALAMA KAKANILUA, PELE DEFENSE FUND  
& HO‘OPONOPONO O MĀKENA

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[Kristin.Tarnstrom@co.maui.hi.us](mailto:Kristin.Tarnstrom@co.maui.hi.us)

☒ VIA EMAIL  
☐ VIA U.S. MAIL,  
POSTAGE PREPAID

Attorneys for  
DIRECTOR OF THE DEPARTMENT OF  
PLANNING, COUNTY OF MAUI

DATED: Honolulu, Hawai‘i, February 10, 2023.



WILLIAM MEHEULA  
Attorney for BRE ICONIC GWR OWNER, LLC

